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# Supreme Court of the United States

**October Term, 1977**

**No. 76-1121**

AMERICAN BROADCASTING COMPANIES, INC., *et al.*

v.

WRITERS GUILD OF AMERICA, WEST, INC., *Respondent.*

**No. 76-1153**

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC., *Petitioner,*

v.

WRITERS GUILD OF AMERICA, WEST, INC., *Respondent.*

**No. 76-1162**

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

WRITERS GUILD OF AMERICA, WEST, INC., *Respondent.*

**On Writs of Certiorari to the United States Court of Appeals for the Second Circuit**

## MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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## MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file the attached brief *amicus curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. Counsel for the petitioner Labor Board and for respondent have consented to the filing of that brief, but counsel for the employer petitioners have refused such consent.

## INTEREST OF THE AMICUS CURIAE

The AFL-CIO is a federation of 108 national and international unions having a total membership of approximately 16,600,000 men and women. Many of the AFL-CIO affiliated unions have supervisor-members, and seek the support of such members when they engage in economic strikes. The disciplining of members, including supervisors, who fail to adhere to union rules during strike situations is one of many ways AFL-CIO unions have traditionally used to assure the solidarity which is basic to a successful strike. Thus, the issue raised in this case is of uncommon importance to the AFL-CIO and its affiliates.

But the AFL-CIO has another, special interest in this case as well. The AFL-CIO filed a brief *amicus curiae* in *Florida Power & Light Co.* v. *IBEW, Local 641,* 417 U.S. 790 (hereafter "*FP&L*"), and counsel for the AFL-CIO argued orally in that case. The opinion in that case appeared to us to instruct the NLRB in no uncertain terms that the broad approach to § 8(b)(1)(B) it adopted beginning in 1968 was entirely wrongheaded and had to be rethought completely. Instead, the Board has insisted that *FP&L* has no application except to the precise fact situation there involved, and has, in our view, refused to abide at all by the reasoning of this Court's opinion. Thus, we are concerned here not only with the outcome of this particular case, but with establishing that, when this Court pronounces a general approach to an area of labor law within the jurisdiction of the NLRB, the Board cannot limit its obedience to the narrow confines of the holding but must proceed with conceptual faithfulness as well to the Court's opinion. Otherwise, not only is this Court's integrity threatened, but litigants are constrained, in order to obtain a fair analysis under the announced principles, to carry on to the courts of appeal, and to this Court, cases presenting every variant on the problem, rather than accepting the judgment of the agency ordinarily entrusted with explicating the NLRA.



## ISSUES TO BE COVERED

This case concerns whether a union violates § 8(b)(1)(B) of the NLRA if it disciplines a supervisor-member of a union for crossing a picket line during a strike to perform mainly supervisory duties. The NLRB has, in our view, failed, in deciding this case and many others, to take into account the reasoning, as opposed to the narrow holding, of *FP&L*. The brief for the Writers' Guild is directed primarily to showing that even on the Board's own approach, the decision cannot stand. The Guild, however, has decided that the AFL-CIO, because of its previous involvement in the legal issues here involved, can most appropriately describe the developments since *FP&L* with regard to § 8(b)(1)(B), and show why the entire approach of the Board, and that of counsel for the Board,* is improper under *FP&L*. The attached brief is therefore addressed to these two problems and covers issues not addressed by the brief for the Guild.

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* The decision of the Board and the brief for the Board in this case proceed upon divergent theories with different implications. See Part II of the attached Brief.

## CONCLUSION

Because the attached brief covers issues not otherwise discussed by the parties and presents background material on the post-*FP&L* approach of the Board which will be of use to the Court, this motion should be granted.

Respectfully submitted,
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## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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The interest of the amicus curiae is described in the motion for leave to file, which is submitted herewith.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Summary of Argument in the Board's brief begins as follows:

> "Under *Florida Power and Light Co.* v. *International Brotherhood of Electrical Workers*, 417

> U.S. 790, union discipline of a member-supervisor 'can constitute a violation of § 8(b)(1)(B) * * * when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.' 417 U.S. at 804-805." (Bd. Br. 9-10.)[1]

The same quotation, with the same elision, is repeated in the body of the argument at Bd. Br. 14 as the predicate of the Board's contention that the union's conduct was unlawful under *Florida Power & Light* (hereafter "*FP&L*"). The asterisks in the Board's quotations are a substitute for the word "only" in the original. The excision of that word changes the entire meaning of the passage. The Board's version conveys the meaning that the potential effect of discipline on the supervisor's conduct as grievance adjuster or collective bargainer is *sufficient* to establish a violation of § 8(b)(1)(B). But if the sentence is read in full, and even more properly, if it is read together with the sentence which precedes it, it is apparent that the Court's meaning was that such an effect was a *necessary* condition for finding a violation of § 8(b)(1)(B):

> "Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the *selection* of its representatives for

[1] "Bd. Br." refers to the brief of the National Labor Relations Board before this Court. "Bd. Pet." refers to the Board's petition for certiorari. "Ass'n Br." refers to the brief of the Association of Motion Picture and Television Producers, Inc. "ABC Br." refers to the brief of American Broadcasting Companies, Inc., *et al.* "A" refers to the record appendix in this Court.



> the purposes of collective bargaining and grievance adjustment. The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." (417 U.S. at 804-805, emphasis in original.)

Indeed, the thrust of the entire part II of this Court's opinion is to reject the Board's sweeping approach to § 8(b)(1)(B) which originated in the *Oakland Mailers* case[2] as inconsistent with its language and legislative history. The Court held:

> "Both the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances. By its terms, the statute proscribes only union restraint or coercion of an employer 'in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances,' and the legislative history makes clear that in enacting the provision Congress was exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment." (*Id.* at 803.)

Nevertheless, neither the Board's brief nor those of the

[2] *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.)* 172 NLRB 2173.

other petitioners so much as acknowledge this holding or attempt in any way to do business with this Court's analysis of the text and legislative history of § 8(b)(1)(B). Their failure to do so is, perhaps, a clearer demonstration that their position is without merit than anything which respondent or this *amicus* can say.

The respondent union's brief is devoted primarily to the proposition that the Board erred in finding a violation of § 8(b)(1)(B) even on its own constricted reading of *FP&L*, because the determination that the discipline would have an adverse effect on the disciplined individuals' performance of their § 8(b)(1)(B) functions is arbitrary and unwarranted. We shall not repeat those arguments. In part I of this brief, we shall show that even as, beginning with *Oakland Mailers*, the Board's interpretation of § 8(b)(1)(B) came loose from its moorings in the language of the statute and its legislative history, so, too, the Board's decisions since *FP&L* have taken no heed of this Court's interpretation of § 8(b)(1)(B) in that case. We shall document that the Board has declined even to reconsider *Oakland Mailers* and its progeny but has simply continued as before. The Board has in no case addressed itself to the analysis of the statute and the legislative history which was the basis of this Court's decision in *FP&L*. We note particularly that in the Board's leading *Hammond Publishers* and *Triangle Publications* cases, which were followed in its decision herein, the Board ignored, or misread *FP&L* in at least five separate respects.

In part II, we discuss this case in terms of the analysis followed in *FP&L*. The central premise of *FP&L* is that § 8(b)(1)(B) is a narrowly focused provision concerned exclusively with preventing coercion with respect to *selection* of management representatives to perform two discrete functions—bargaining and adjusting grievances, and that section is *not* concerned with the general problem of assuring supervisor loyalty to management. Yet, the Board's decision here rested on the theory that if a supervisor is disciplined for crossing a picket line to perform mainly supervisory work, he would be influenced when, in the future, he bargains or adjusts grievances.



We demonstrate in part II (A) that this thesis is inconsistent with each link of the *FP&L* analysis: it has nothing to do with *selection* of § 8(b)(1)(B) representatives; it fails to recognize that there is no inextricable connection between general supervisory duties and § 8(b)(1(B) duties; and it rests at bottom directly on the conflict-of-loyalties approach this Court disavowed. We explain also that the Board's inference is without basis in industrial experience, and show that the Board's use of that inference to establish a violation is the same method of decision which was discredited in prior cases. (*Teamsters Union* v. *Labor Board*, 365 U.S. 667; *Labor Board* v. *News Syndicate Co., Inc.*, 365 U.S. 695; and *Labor Board* v. *Insurance Agents*, 361 U.S. 477.)

In part II (B) we discuss the Board's brief, which proceeds on an entirely different approach. It asserts that the union here violated § 8(b)(1)(B) because its efforts, if successful, would deprive the employer of his § 8(b)(1)(B) representatives for the duration of this strike and of any future strike. This theory ought not be considered, since it was not the basis upon which the Board reached its result. *NLRB* v. *Food Employers Council*, 417 U.S. 1, 9. In any event, this theory is inconsistent in the results it ordains both with *FP§L* and with the Board's own post-*FP§L* cases, and it,

like the position of the Board, rests, on examination, on the same conflict-of-loyalties approach with which § 8(b)(1)(B) is unconcerned.

## ARGUMENT

### I. THE BOARD HAS STEADFASTLY REFUSED TO ACCEPT THIS COURT'S ANALYSIS OF § 8(b)(1)(B).

**A.** In *FP&L* this Court traced the history of the Board's interpretation of § 8(b)(1)(B):

> "For more than 20 years after § 8(b)(1)(B) was enacted in 1947, the Board confined its application to situations clearly falling within the metes and bounds of the statutory language. • • • In 1968, however, the Board significantly expanded the reach of § 8(b)(1)(B), with its decision in *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.)*, 172 N.L.R.B. 2173. • • •
>
> Subsequent Board decisions extended § 8(b)(1)(B) to proscribe union discipline of management representatives both for the manner in which they performed their collective-bargaining and grievance-adjusting functions, and for the manner in which they performed other supervisory functions if those representatives also in fact possessed authority to bargain collectively or to adjust grievances. • • •
>
> These decisions reflected a further evolution of the *Oakland Mailers* doctrine. In *Oakland Mailers*, the union had disciplined its supervisor-members for an alleged misinterpretation or misapplication of the collective-bargaining agreement, and the Board had reasoned that the natural and foreseeable effect of such discipline was that in interpreting the agreement in the future, the supervisor would be reluctant to take a position adverse to that of the union. In the subsequent cases, however, the Board held that the same coercive effect was likely to arise from the disciplining of a supervisor whenever he was engaged in management or supervisory activities, even though his collective-bargaining or grievance-adjustment duties were not involved. Through the course of these decisions, § 8(b)(1)(B) thus began to evolve in the view of the Board and the courts 'as a general prohibition of a union's disciplining supervisor-members for their conduct in the course of representing the interests of their employers.'" (417 U.S. at 798-802.)



In *FP&L* and a companion case, the Board tightened the screw another notch, holding "that § 8(b)(1)(B) forbids union discipline of supervisors for performance of rank-and-file work on the theory that the performance of such work during a strike is an activity furthering management's interests" (417 U.S. at 802). That holding was expressly disapproved by this Court on June 24, 1974, as inconsistent with the language and legislative history of § 8(b)(1)(B).

**B.** The first case in which the Board addressed § 8(b)(1)(B) after *FP&L* was decided was *Teamsters Union Local 524, etc. (Yakima County Beverage Co.)*, 212 NLRB 908.[3] The issue there was whether the respondent union had violated § 8(b)(1)(B) by fining three supervisor members for working contrary to the collective bargaining agreement after regular quitting time without prior agreement from the union.

The Board did not consider whether, although *FP&L* did not overrule *Oakland Mailers*, this Court's reasoning re-

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[3] *Local No. 492, United Brotherhood of Carpenters and Joiners of America and Keystone Conservation Services, Inc.*, 211 NLRB 62, cited at Ass'n Br. 17, was decided on May 31, 1974, two weeks prior to *FP&L*.

quired the abandonment or partial modification of the "principles" declared in that case. Rather, although quoting this Court's "outer limits" language, the Board relied on *Oakland Mailers'* expansive progeny in stating the broad interpretation which it would continue to follow:

> "We have consistently applied these principles in finding union disciplinary actions against supervisors unlawful where they were rooted in disputes between employers and unions over the interpretation of their collective-bargaining agreement. Our concern in each of these cases rested upon the union's use of unlawful means to impose its interpretations directly or indirectly upon an employer's representative which, in turn, infringed upon the employer's right to unencumbered control of that representative." (212 NLRB at 909-910, omitting a footnote which cites many of the same cases referred to at 417 U.S. 800-801.)

Consistent with that approach the Board paid no heed to the factual difference between *Oakland Mailers* and the case before it. Whereas in *Oakland Mailers* the supervisor had been disciplined for misinterpreting or misapplying the agreement with respect to the work of rank and file employees (see 417 U.S. at 800 & 801), the supervisor in *Teamsters* was disciplined for himself performing work in violation of the agreement. The Board did not find that the discipline had been imposed for exercising a § 8(b)(1)(B) function or even a "supervisory or management function"; it stated only that it was "*arguably* for exercising supervisory or management functions" (*id.* at 910, n. 6, emphasis added):

> "We note that Florida Power & Light Co., supra, involved union fines against supervisor/members for allegedly performing rank-and-file work during a strike. Here the fines were imposed in a nonstrike setting, arguably for exercising supervisory or management functions, in an effort to impose the Respondent's interpretation of the collective-bargaining contract upon representatives of the Employer. We do not read the Supreme Court's opinion in Florida Power and Light, supra, to say that a union, consonant with Section 8(b)(1)(B), is free to discipline supervisor/members under the circumstances of the present case." (*Id.*)



This footnote was the Board's only other response to *FP&L* in its *Teamsters* opinion.

The next § 8(b)(1)(B) case decided by the Board followed *FP&L* to hold that a union had not violated § 8(b)(1)(B) by fining a supervisor for crossing a picket line and performing rank and file work. *International Union of Operating Engineers, Local No. 9, AFL-CIO (Shelton Pipeline & Construction, Inc.) and Robert Collins*, 213 NLRB 679. The Board determined that the disciplined union member was in fact a representative of the employer "for the purpose of * * * the adjustment of grievances," but that he "was not engaged in performing the duties of, and acting in the capacity of, grievance adjuster or collective bargainer on behalf of the Employer when he crossed the picket line and performed struck work" (*id.* at 680). Thus, the Board appeared to confine the supervisor-member's protection against discipline to situations in which he performed activity squarely within § 8(b)(1)(B). Moreover, the ALJ's decision in the case shows that what the Board referred to as "rank and file struck work" was work of a kind which the supervisor had also performed during period "when there was a shortage of manpower" (*id.* at 679). This is signifi-

cant, because it is identical to the situation of the supervisors in the instant case who crossed the picket line to perform "(a) through (h) functions"; yet, here, in contrast to *Operating Engineers*, the Board found a violation, apparently treating these as "supervisory functions" because the agreement permitted the supervisors to perform them, see Bd. Pet. 35a, text and note at n. 10.

Any hope that the *Operating Engineers* case signalled a reexamination of the Board's approach to § 8(b)(1)(B) was soon dashed. In fact, the *Operating Engineers* case has not been cited in any Board majority opinion.[4]

The major development in the Board's post-*FP&L* interpretation of § 8(b)(1)(B) occurred in three cases decided on the same day—*New York Typographical Union No. 6 (Triangle Publications, Inc.)*, 216 NLRB 896; *Chicago Typographical Union No. 16 (Hammond Publishers, Inc.)*, 216 NLRB 903; and *Bakery and Confectionery Workers Local Unions 24 and 419 (Food Employers Council, Inc.)*, 216 NLRB 917. In each of these cases the union had disciplined a supervisor member for crossing a picket line during a strike by the union. The rule which emerged from these three cases was that a union violates § 8(b)(1)(B) if it disciplines a supervisor who after crossing its picket line performs "not only supervisory duties (including grievance adjusting) but also, at least arguably, a minimal amount of rank-and-file work during the work stoppage" (*Hammond Publishers*, 216 NLRB at 904). The term "minimal"

[4] The only reference to the case in Shepard's Federal Labor Law Citator through August 1977 is in a concurring opinion by Member Fanning, who has consistently disagreed with the majority's analysis. See *United Brotherhood of Carpenters and Joiners Local Union No. 14, etc.*, 217 NLRB 202, 203, n. 6.



amount of rank-and-file work does not mean work which is so slight as to be regarded as "*de minimis*" in legal parlance, see p. .... *infra*.

Because the Board in the instant case followed *Hammond* and *Triangle* to find a violation (Bd. Pet. 13a, n. 6) we leave a more detailed discussion of the Board's rationale in those decisions to the next section of our brief. However, certain general observations concerning the Board's approach to *FP&L* are appropriate at this point.

1. The Board did not discuss this Court's analysis of the language and legislative history of § 8(b)(1)(B). It did not even acknowledge, must less attempt to deal with, the Court's conclusion that these "reflect a clearly focused congressional concern * * *" (417 U.S. at 803, quoted at p. 17, *infra*).

2. The Board treated as the single issue whether discipline "may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer" (216 NLRB at 903-904, quoting 417 U.S. at 804-805). It did not consider that this Court said that a violation can be found "only" under those circumstances, but took it as given, despite everything else in the opinion, that a "may affect" finding establishes a violation. Indeed, the Board rather incredibly regarded this Court's assumption that *Oakland Mailers* itself may be on the "outer periphery" under that test as implict approval of the *Oakland Mailers* rationale:

> "By assuming without deciding that Oakland-Mailers' fell within the outer limits of its test, the Supreme Court has implicitly recognized that an adverse carryover effect may result where the dis-

ciplined supervisor had been engaged in the activity of contract interpretation." 216 NLRB at 904.[5]

In a footnote to this passage, the Board took comfort from this Court's description of *Oakland Mailers*:

> "We note that in discussing Oakland-Mailers' the Supreme Court recognized that: 'the Board had reasoned that the natural and foreseeable effect of such discipline was that in interpreting the agreement in the future, the supervisor would be reluctant to take a position adverse to that of the union.' " *Id.* at n. 7.

But the fact that this Court correctly understood the Board's reasoning in a case cannot mean that it agreed therewith, when the Court at the same time expressly reserved decision on whether that case was correct. And of course, the Board necessarily ignored the characterizations of the other pre-*FP&L* cases as an extension of *Oakland Mailers*, 417 U.S. at 800-802, quoted at p. 6, *supra*, and failed to consider that these other cases may have been implicitly disapproved when the Court assumed that *Oakland Mailers* itself is at the outer periphery of the "may affect" test.

3. In determining that the "may affect" test was met, the Board did so on the basis of its assumption that "it is reasonably likely" that the discipline would adversely affect the supervisor's future conduct as § 8(b)(1)(B) representative. In so doing, it expressly refused to distinguish between the performance of supervisory functions and the performance of grievance adjustment functions during the strike,

[5] The Board thus went beyond its prior *Teamsters* case where *Oakland Mailers* was deemed to be unaffected by *FP&L*. See p. 8, *supra*.



despite this Court's teaching that the Act itself draws this distinction. See pp. 14-15, *infra*, quoting FP&L, 417 U.S. at 811, n. 21. Nor did it explain why the impact on the supervisor is greater when he performs only a "minimal" amount of rank and file work during the strike than when he has performed a greater amount.

4. The Board did not consider the impact of its ruling on the union's use of economic weapons. It therefore failed to heed the teachings of *Labor Board* v. *Drivers Local Union*, 362 U.S. 274, 282-283, and *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 490, which were reaffirmed in *FP&L*, 417 U.S. 805, n. 16, quoted at p. 32, *infra*.

5. The Board again justified its decision as necessary to protect the employer against a "conflict of loyalties", although this Court squarely held in *FP&L* that § 8(b)(1)(B) was not designed to deal with that problem. See 417 U.S. at 805-813, discussed at p. 26, *infra*.

Subsequent cases have adhered to *Hammond Trimount* and its limitation in *Food Employers Council* and to some extent fleshed out what is meant by "minimal".[6] But those cases have done so without any further explanation of

[6] A supervisor's performance of 40%-50% rank and file work which did not represent an increase in his pre-strike bargaining unit work has been treated as "minimal," and the Board has held that it was *unlawful* to discipline him. *Warehouse Union Local 6, etc. (Associated Food Stores, Inc.)*, 220 NLRB 809. See also *Wisconsin River Valley District Council, etc. (Skippy Enterprises, Inc.)*, 218 NLRB 1063 (30%). On the other hand, where a supervisor performed 40% rank and file work and this did represent an increase in his pre-strike bargaining unit work, the Board has held that it was *lawful* to discipline him. *Glaziers and Glass Workers (The Glass Management Association)*, 221 NLRB 509; see also, *e.g.*, *Meat and Provisions Drivers Union, etc. (Quality Meat Packing Co.)*, 224 NLRB 186. However, the Board has in at

the nexus between its definition of "minimal" and its conclusion that supervisor's future performance as a § 8(b)(1)(B) representative would be affected.

One additional departure from *FP&L* merits brief comment. In *United Brotherhood of Carpenters, etc. (Max M. Kaplan Properties)*, 217 NLRB 202, the Board treated the supervisor as an "employer representative" within § 8(b)(1)(B) although he possessed neither of the functions described in § 8(b)(1)(B):

> "We also agree with the Administrative Law Judge's conclusion that Bradshaw was an employer representative within the intent of Section 8(b)(1)(B), notwithstanding the fact that the record failed to establish that Bradshaw was actually vested with authority to act for his employer in collective bargaining or the adjustment of grievances. This conclusion follows by virtue of our rule that persons who are supervisors within the meaning of the Act are employer representatives within the meaning of Section 8(b)(1)(B)." (*Id.*)

Although the cases cited in support of that "rule" (*id.* at n. 1) all antedated *FP&L*, the Board adhered thereto without even passing acknowledgement of this Court's contrary construction of the Act in that case:

> "Further support for the proposition that § 8(b)

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least one case *(Glaziers, supra)* found that disciplining one supervisor who had performed some rank and file work which he would would not have performed but for the strike, was unlawful. Indeed, in one post-*Hammond* case it was expressly declared to be irrelevant whether the supervisors' rank and file work during the strike was greater than that before the strike. *United Brotherhood of Carpenters, etc. (Max M. Kaplan Properties)*, 217 NLRB 202. Despite the apparent inconsistency of some later cases, *Kaplan* has never been expressly disapproved.



> (1)(B) was addressed to a separate and far more limited problem than that of conflict of loyalties dealt with in §§ 2(3), 2(11), and 14(a) is found in the differing scope of the provisions themselves. Section 8(b)(1)(B) purports to cover only those selected as the employer's representative "for the purposes of collective bargaining or the adjustment of grievances," whereas the class of supervisors excluded from the definition of employees in § 2(3) is defined by § 2(11) to include individuals engaged in a substantially broader range of activities. * * * The two groups coincide only with respect to the function of grievance adjustment." (417 U.S. at 811, n. 21.)

## II. THE BOARD'S DECISION IS INCONSISTENT WITH THIS COURT'S INTERPRETATION OF § 8(b)(1)(B); BOARD COUNSEL'S THEORY IS INCONSISTENT WITH THIS COURT'S DECISION AND THAT OF THE BOARD.

### A. *The Board's Decision.*

The theory of the Board's decision is that disciplining supervisors-members of unions for crossing picket lines is a § 8(b)(1)(B) violation except when the supervisor performs a substantial amount of rank-and-file work behind the line, because if disciplining is permitted, it is reasonably likely that the supervisor, in bargaining or adjusting grievances in the future, will side with the union's views. As we have shown, this theory conflicts with *FP&L* in at least five respects. We now examine the theory in detail, in light of this Court's statutory analysis.

It is important, however, first, to place this case in context. The supervisory members in this case were under no compulsion to join or remain members of the union. The employer was under no compulsion to allow them to be

members of the union. (See *Florida Power and Light*, 417 U.S., at 489-493.) It was plainly a rule of this union—as of almost any union—that members may not work during a strike; the supervisors undertook this obligation by remaining in the union, and the employer assumed the risk that his supervisors would not work during a strike by allowing them to remain in the union. There is no evidence whatever that the union's concern in enforcing this rule was to affect either the manner in which or the fact that the supervisor-members adjusted grievances or bargained. Indeed, there would be no incentive to do so since, with the exception of one disputed group,[7] the supervisor-members neither adjusted grievances for nor bargained with members of the striking union, and the union rule was applied equally to all categories of supervisors.

The question, then, is whether supervisors are, by virtue of § 8(b)(1)(B) of the NLRA, entitled to ignore an obligation they freely assumed, with respect to a matter integrally related to the *raison d'etre* of the union, because of a presumed, indirect effect upon their employers' relationship with their § 8(b)(1)(B) representatives. The exegesis of § 8(b)(1)(B) in *Florida Power* makes plain that they are not.

Petitioners here note, quite correctly, that the *facts*

[7] The disputed group is that of story editors. Even as to them, the grievances they are asserted to "adjust" pertain to credits (A. 109). The collective bargaining agreement makes clear that the union has the ultimate decision on such matters (A. 54, 55, 142-143, 249-275), which basically involve disputes among union members and not between employees and the employer. Thus, there is no incentive for influencing the decision of the story editors on these questions, since the union has direct appellate powers and need not resort to indirect influences.



of *Florida Power & Light* concerned discipline of supervisor-members for crossing a picket line to perform rank-and-file work. They stubbornly insist that, therefore, the case has no application to any other situation. But, the rationale of *Florida Power* plainly goes beyond the facts of that case and squarely controls this one.

While the Court in *Florida Power & Light* did not purport to decide cases not before it, it plainly rejected the thrust of the developments which began under § 8(b)(1)(B) in 1968. For, the opinion explained,

> "[b]oth the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances. By its terms, the statute proscribes only union restraint or coercion of an employer 'in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances,' and the legislative history makes clear that in enacting the provision Congress was *exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment.*
>
> • • •
>
> Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion *when engaged in any activity other than the selection of its representatives for the purposes of collective bargaining and grievance adjustment.*" (417 U.S., at 803, 805, emphasis supplied).

Moreover, with respect to the assertion that § 8(b)(1)(B) cannot be so narrowly confined because "such fines clearly interfere with the employer's control over its own representatives," the Court stated decisively:

> "Congress' solution was essentially one of providing the employer with an option. On the one hand, he is at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor union, see *Beasley* v. *Food Fair of North Carolina, Inc.*, supra. Alternatively, an employer who wishes to do so can permit his supervisors to join or retain their membership in labor unions, resolving such conflicts as arise through the traditional procedures of collective bargaining. But it is quite apparent, given the statutory language and the particular concerns that the legislative history shows were what motivated Congress to enact § 8(b)(1)(B), that it did not intend to make *that* provision any part of the solution to the generalized problem of supervisor-member conflict of loyalties." (*Id.* at 812-813, footnotes omitted.)

Thus, the Court in *Florida Power & Light* held, first, that § 8(b)(1)(B) is confined to coercion concerning the *selection* of § 8(b)(1)(B) representatives, and not their behavior; second, that it is properly concerned only with two discrete functions which some, but not all, supervisors perform; and third, that it prohibits not any action which could conceivably lead a supervisor to act in the interest of the union rather than the employer but only those actions directly related to the two functions with which § 8(b)(1)(B) is concerned—bargaining, and adjusting grievances. Under this analysis, the theory that the discipline here was



in violation of § 8(b)(1)(B) because of a possible carry-over effect on later performance of § 8(b)(1)(B) functions cannot prevail.

The cases cited in the Board's decision rest on the psychological prediction that if a supervisor is disciplined for crossing a picket line to perform supervisory duties, "it is reasonably likely that an adverse effect will carry over to the supervisor's performance of his § 8(b)(1)(B) duties." *Hammond Publishers*, 216 NLRB at 904; *Triangle Publications*, 216 NLRB at 896. Even if this result were a "foreseeable consequence" (*Hammond Publishers*, 216 NLRB, at 903, n. 6) of the union's action, it would have no impact at all on the employer's *selection* of representatives for bargaining or grievance adjustment. The only effect, if there were one, would be on the *manner* of performance of those duties. Since the protection of § 8(b)(1)(B) does not extend to "protection [of] the employer from union restraint or coercion when engaged in any activity other than the *selection* of its representatives for the purposes of collective bargaining and grievance adjustment" (417 U.S., at 805, emphasis in original), the prohibition would not bar the activity here even if the Board's prediction were accurate and, if accurate, were sufficient otherwise to sustain a finding of a § 8(b)(1)(B) violation.

The Court in *Florida Power & Light* did, however, "assume without deciding that the Board's *Oakland Mailers'* decision fell within the outer limits" of § 8(b)(1)(B), and *Oakland Mailers'* involved an attempt to influence not the identity of the § 8(b)(1)(B) representative but the manner in which he interpreted the agreement. We believe that, if the Court were compelled to decide whether *Oakland Mailers'* was properly decided, it would have to conclude that

it was not, for it clearly did *not* involve an attempt to influence the *selection* of the § 8(b)(1)(B) representative.[8] But in this case, as in *Florida Power and Light*, it is possible to "assume without deciding" that discipline of supervisors for the manner in which they bargain or adjust grievances is "within the outer limits" of the statute. For, if *Oakland Mailers* is at the outer limit, this case is clearly beyond that limit, for it does *not* involve discipline for the manner in which § 8(b)(1)(B) functions were performed.

[8] Aside from the language and legislative history set forth in *FP & L*, simple logic compels the conclusion that § 8(b)(1)(B) must be limited to attempts to influence the *identity* of bargaining and grievance representatives. For, of course, it is most of the function of unions, protected by the NLRA, to influence the *positions* of bargaining representatives and grievance adjusters. For example, to take the *Oakland Mailers* situation, if a union working under a contract without an arbitration or no-strike clause went on strike and threw up picket lines to protest the contract interpretation in question, it would not violate § 8(b)(1)(B), but instead, would be engaging in the use of an economic weapon not proscribed at all by the NLRA.

It is interesting in this connection that one of the petitioners maintains "that the instant case is controlled by the Board's decision in *New Mexico District Council of Carpenters* (*A. S. Horner, Inc.*) [177 NLRB 500, enf'd. 454 F.2d 1116 (CA 10).]" (Ass'n. Br., at 22.), and that it is *therefore* unnecessary here to determine whether *Oakland Mailers* was rightly decided. The *Horner* case, was cited by this Court in *FP&L* as one of those cases which went beyond *Oakland Mailers* (417 U.S. at 801). And, in fact, the Board's decision in this case is *not* controlled by *Horner* but goes beyond not only *Oakland Mailers* but that case as well. For, in *Horner*, the supervisor could have complied with the union's demands, and avoided discipline only by resigning from his position permanently. Here and in *Hammond*, the union was demanding only that supervisors not work for a limited time period. Thus, since *Oakland Mailers* is at best, at the "outer limits" of § 8(b)(1)(B), this case is at two removes from those limits, and clearly outside that provision.



The Board attempts to jump this gap by arguing that "where the disciplined supervisor has engaged * * * *only* in the performance of supervisory activities (not limited to grievance adjustment or collective bargaining) * * * there is clearly a violation since it is reasonably likely that an adverse effect will carry over to the supervisor's performance of his § 8(b)(1)(B) duties." (*Hammond Publishers, Inc., supra* at 904.)[9] But there is no attempt to explain, other than the bare assertion, how this prediction is any more reasonable than the possibility of a similar "carryover" effect if the supervisor performs only rank-and-file work behind the picket line. Particularly telling is the fact that the Board maintains that this "carryover" will occur *whether or not* the supervisor performs any § 8(b)(1)(B) functions during the strike. This elision lays bare that the Board has once again lost sight of the fact that § 8(b)(1)(B) is not " 'a general prohibition of a union's disciplining supervisor-members' * * * for acts 'performed in the course of [their] management duties.' " *Florida Power & Light*, at 802.

Indeed, this case demonstrates that the Board's prediction, although it purports to be a permissible inference about human behavior, is actually an attempt to establish a rule of law divorced from any factual considerations. For, here, there is absolutely no evidence that the union ever attempted to discipline, or asserted the power to discipline, supervisors for the way in which they perform

[9] "We believe that the adverse future effect which the Supreme Court referred to as violative in *Florida Power* is as likely to occur, regardless of a union's professed reasons or intent, if a supervisor-member is disciplined after having performed only his normal supervisory duties or if he is disciplined after having engaged in contract interpretation." *Triangle Publications, Inc., supra*, at 897.

§ 8(b)(1)(B) functions. In fact, as explained earlier, both the union and the supervisors are perfectly aware that the union has no interest in how the supervisors perform those functions, because for the most part they do not involve members of this union, and because to the extent that they do the union has control under the agreement over the ultimate decision anyway.

Moreover, even in cases where there is a direct union interest in the supervisor's performance of § 8(b)(1)(B) functions, the "prediction" really amounts to the contention that the discipline can be barred because, while not illegal in itself, it might in the future promote adherence to the desires of the union. The effect is to declare illegal action which Congress has *not* declared contrary to the labor policy.

*Teamsters Union* v. *Labor Board*, 365 U.S. 667, and *Labor Board* v. *News Syndicate Co.*, 365 U.S. 695, are similar to this case in that the Board's decisions which were reversed relied upon inferences that contract provisions facially valid were illegal because they might encourage or make easier illegal action in the future.

*News Syndicate* is most directly in point. One of the Board's theories there was that it was illegal to require foremen to be a member of the union without certain safeguards because the foremen would, in hiring, follow the General Laws of the union, which required a preference for union members in hiring. This Court disagreed:

> "We also believe the Court of Appeals was right in concluding that the contract on its face is not unlawful even though the foremen—who are union members—do the hiring. In the first place, the contract (unlike the General Laws) does not require journeymen and apprentices to be union members. In the second place, the provisions of the contract which we have set forth make the foremen '*solely* the employers' agents,' as the Court of Appeals concluded. 279 F.2d at 330. Finally, as we said in *Teamsters Union* v. *Labor Board* decided this day we will not assume that unions and employers will violate the federal law, favoring discrimination in favor of union members against the clear command of this Act of Congress. As stated by the Court of Appeals, 'In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.' " (*News Syndicate, supra*, 365 U.S. at 699-700).



The Court recognized that to permit the Board to ban activity which Congress did not outlaw because of a presumption that it would lead to illegal action in the future is not at all an application of the Board's authority to draw rational inferences from a set of facts but, instead, amounts to interdicting behavior which Congress has not outlawed. See also *Teamsters*, 365 U.S. at 699-700. No more may the Board, or this Court, assume that, if attempts to influence § 8(b)(1)(B) conduct directly by discipline of supervisor-members for the manner in which they perform *those* functions *is* illegal, the union will nonetheless attempt to do so, using its past discipline under entirely different circumstances as a lever.

Nor is the inference entitled to any more weight on the ground that, even if the union expressly renounced any desire to influence future bargaining or grievance adjustment, the supervisor, having once felt the power of the union, would be likely to act in a manner he perceives they

would prefer. The Board's reliance on *Radio Officers* v. *Labor Board* 347 U.S. 17 for the legitimacy of its inference that the supervisor will be adversely affected is not only misplaced, it is self-defeating. For it makes it all the more plain that the method of decision is the same as that which was rejected in *Teamsters* and *News Syndicate*. In those cases, the Board's argument was based on what it believed the employees (in both cases) and the supervisors (in *News Syndicate*) might think. And it heavily relied on *Radio Officers* to justify that reasoning, and to pretermit review thereof. The parallel between the rejected Board argument in *News Syndicate*, and its reasoning in *Hammond Publishers*, 216 NLRB 903, n. 6, is particularly striking:

> "In sum, in view of the history of the ITU's efforts to maintain closed shop conditions and the role played by the General Laws in this effort, the Union and the publishers had reason to believe that, without specifying what provisions of the Laws were deemed illegal and thus excluded, the employees and the foremen would tend to view them as all operative, including the closed shop provisions, at least until an appropriate tribunal should rule otherwise. And the conduct of the hiring in this case shows that the contract was in fact so interpreted. Since a person is deemed to intend the foreseeable consequences of his conduct (*Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 45), the legal effect of the General Laws clause is thus the same as though the ITU and the publishers had specifically set out closed shop provisions in the contract."[10]

[10] Brief for the National Labor Relations Board, No. 339, Oct. Term 1960. See also the Board's brief in *Teamsters Union* (Nos. 64 and 85, Oct. Term 1960), particularly at 38-39 and *id.* n. 19.



Moreover, in the present context, the Board's inference of an adverse impact on the supervisor really amounts to nothing more than a restatement in other words of the conflict-of-loyalties approach definitively rejected in *Florida Power & Light* as beyond the scope of § 8(b)(1)(B). That is, it is merely an assertion that the supervisor might consider when discharging § 8(b)(1)(B) obligations in the future the fact that he has pledged adherence to the union.

The Board's decisions recognize that at bottom this is all they are saying, but assert that this Court did not mean what it clearly said regarding the lack of pertinence of the "conflict of loyalties" problem to § 8(b)(1)(B). For, in *Hammond Publishers*, the Board said:

> "We do not believe that this analysis conflicts in any way with the Supreme Court's treatment of the issue of a supervisor-member's conflict of loyalties. The Supreme Court stated that an employer may not permit a supervisor to become a union member and yet continue to be able to demand "absolute loyalty" from that supervisor. We interpret this to mean that an employer who permits his supervisors to become union members may no longer demand the loyalty of these supervisors if they cross a picket line and in effect, substitute their services for those of the rank-and-file employees. In this same regard, however, we do not believe that the Supreme Court's decision is so broad that it means that an employer surrenders his right to require the loyalty of these same supervisors when they cross a picket line and thereafter

perform substantial supervisory functions * * *." (*Id.* at 905 [11]).

But the opinion clearly *is* "so broad". For, it identifies the Congressional policy with regard to loyalty of supervisors as addressed entirely by §§ 2(11) and 14(a) of the Act, and not at all by § 8(b)(1)(B). (*Florida Power & Light*, 417 U.S., at 807). And it makes plain that the policy of those sections is

> "essentially one of *providing the employer with an option*. On the one hand, he is at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor union, * * * Alternatively, an employer who wishes to do so can permit his supervisors to join or retain their membership in labor unions, resolving such conflicts as arise through the traditional procedures of collective bargaining." (417 U.S., at 812-813, emphasis supplied.)

Thus, the very point of *Florida Power & Light* in this regard is that an employer who has not exercised his option to refuse to permit union membership of supervisors *has* relinquished his right "to demand absolute loyalty" except insofar as he resolves any conflict of loyalty problems through bargaining. For,

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[11] See also *Triangle Publications* 216 NLRB at 897: "Therefore, under our view of *Florida Power* and its definition of strikebreaking, the only so-called 'price' that an employer must pay for permitting a supervisor to be a union member, is that the supervisor-member cannot, with immunity, cross union picket lines to perform rank-and-file work."



> "inherent in the option afforded the employer by Congress, must be the recognition that supervisors permitted by their employers to maintain union membership will necessarily incur obligations to the union." (*Id.*, at 813 n. 22).

These obligations may be felt or given effect, in exercising a § 8(b)(1)(B) function, by a supervisor who has once been disciplined by the union for crossing a picket line, but they may also be felt—indeed, are more likely to be felt—by one who has never been so disciplined because he took those obligations seriously and did *not* cross the picket line.

We note finally that there is also considerable similarity between the Board's decision herein and the legal theory which was rejected in *Labor Board* v. *Insurance Agents*, 361 U.S. 477. Here, as there, the Board inferred from a use of an economic weapon by a union that it would have a particular consequence which was an essential element of the unfair labor practice charged. Here, that conduct is the disciplining of a supervisor who is a union member for crossing a picket line during a strike, from which the Board infers that the supervisor would be adversely affected in his future functioning as the employer's grievance adjuster or bargainer. In *Insurance Agents*, it was the use of certain harassing techniques in the course of a strike from which the Board inferred that the union "was only going through the 'motions' of bargaining," (*id.* at 482, n.5), thereby violating § 8(b)(3). Neither inference was based on any demonstrated, or even asserted, industrial experience. As the Trial Examiner in *Insurance Agents* put it, with approval by this Court (*id.*, at nn.4 & 5), the Board there indulged in "mental pole vaulting with only a presumption as a pole." So here. Indeed, the Board, is so casual about finding a vio-

lation that it does so without regard to whether the supervisor's actual duties involve § 8(b)(1)(B) functions, or § 2(11) functions, or other work, and if so, in what proportions either during the strike or thereafter (that is, at the time when, according to the Board's theory, the discipline would have its adverse effect). Instead, the Board has erected a *per se* rule that the union violates § 8(b)(1)(B) whenever it disciplines a supervisor crossing a picket line if he performs less than 40-50% rank- and file-work during the strike. It is such such *per se* rules of illegality which this Court has repeatedly struck down, for these amount to a revision of the balance struck by Congress.[12]

**B.** ***Board Counsel's Theory***

The Board's brief advances an entirely different theory for finding a violation of § 8(b)(1)(B). It argues:

> "The obvious purpose of such actions was to force the hyphenates to honor the Union's picket lines and thus to cease performing their 'supervisory or management functions,' necessarily including grievance adjustment and collective bargaining, for the duration of the strike. Hence, if the hyphenates had succumbed to the Union's threats of discipline and other pressure and had refused to cross the picket lines, the Employers would have been deprived of their chosen representatives for the performance of those functions for the duration

[12] See, in addition to *Insurance Agents* and *Teamsters Union*, *supra*, *American Ship Building* v. *Labor Board*, 380 U.S. 300, 318, and, in a sense, in *FP&L* itself. The Board's method is precisely the opposite of the "totality of circumstances" approach which this Court recently endorsed in *NLRB* v. *Pipefitters*, 429 U.S. 507, 523-524; see also *id.* at 521, n.8, noting that the Board had disavowed "a mechanical test."



> of the strike, no less than if the Union had directly pressured the Employers into removing those representatives from those duties.
>
> Moreover, as for those hyphenates who defied the Union, crossed the picket lines, and were disciplined, the likely effect of such discipline is to deprive the Employers of their collective bargaining or grievance adjustment services in the future. If a union member who is a supervisor is suspended, fired, or otherwise disciplined for crossing a picket line during a strike to perform collective bargaining or grievance adjustment duties, he necessarily will think twice about crossing the union's picket lines in a future strike though only the same duties are required." (Bd. Br. 16-17, footnotes omitted.)

It is obvious that this line of reasoning differs materially from that of the Board decisions. According to the Board's brief, the nexus between the union's discipline and § 8(b)(1)(B) is that the supervisor will simply be unavailable for the purpose of grievance adjustment or other "supervisory or management functions" during the strike, if the threat of discipline is succesful, and that with respect to those who are disciplined for crossing "the likely effect of such discipline is to deprive the Employers of their collective bargaining or grievance adjustment services in the future" (Bd. Br. 16). According to the Board's decision, the nexus is based on an inference of a different future consequence, the impact on the supervisor's performance of his functions in a non-strike situation rather than his total unavailability in the event of a future strike. That, as we have seen, was the Board's holding in the *Hammond Publishers* and *Triangle Publications* cases which were incor-

porated by reference in its decision here (Bd. Pet. 13a, n. 6).[12]

It is plain that Board counsel once again are supplying their own rationalization to justify the Board's decision on appeal, see *Labor Board* v. *Metropolitan Insurance Co.*, 380 U.S. 438, 444; *NLRB* v. *Food Store Employees*, 417 U.S. 1, 9. But the situation is considerably worse than that confronted in those cases, because counsel's theory is flatly inconsistent with that of the Board. Under counsel's theory, a § 8(b)(1)(B) violation would be made out if the supervisors' refusal to cross the picket line because of the threat of discipline resulted in their unavailablity ot resolve any grievance. Thus, there would be a violation even if the supervisors performed more than a "minimum" of rank and file work—that is, even if they performed more than 50% of such work in addition to resolving grievances. But the Board would not find a violation under those circumstances. To that extent, the Board's rule at least gives some effect to *FP&L*, whereas counsel's theory would eviscerate that decision entirely.

Thus, the theory of the Board's counsel is not entitled consideration at all at this juncture, for it is not the premise of the Board's decision and indeed leads to results inconsistent with that premise. But, even if it were considered, the result in this case would be the same. For that approach

[12] It is true that the ALJ found a violation on the basis of reasoning similar to that advanced in the Board's brief. Because of the repugnancy between that theory and the Board's *Hammond*, *Triangle* and *Food Employers Council* decisions, it cannot even be contended that both theories were accepted by the Board in deciding the case. Of course, even if the two lines of argument could somehow be reconciled, the question would remain whether the Board itself had adopted by silence an alternative ground for decision to that which it had articulated at length in the contemporaneous decisions which it cited as controlling authority.



is no less at odds with *FP&L* than that upon which the Board's decision actually rests.

One flaw in that analysis is apparent on the face of the Board's brief. For, to take account of the fact that there is not an iota of evidence that the supervisors here did, or were likely to, bargain or adjust grievances during the strike, the Board counsel asserts that this

> "is immaterial. * * * Because the Act proscribes restraint or coercion in the *selection* of representatives, the legality of the union's discipline should not be made to turn upon the wholly fortuitous (and, for the union, wholly irrelevant) occurrence of an actual grievance among non-striking employees." (Bd. Br. at 18-19, emphasis supplied.)

Of course, the true reason it is "wholly irrelevant" to the union whether or not any § 8(b)(1)(B) activities occur during the strike is that the union is not attempting to "restrain or coerce" the employer (or the supervisor) with regard to those functions, and would impose the same discipline if no § 8(b)(1)(B) functions were performed behind the line. Board counsel maintains that motivation is not dispositive here. But, by insisting that not only need there be no proscribed intent, there also need be no proscribed *effect* either, counsel seems to be asserting that the case need not be proven at all. Before an employer can claim that he has been deprived of his selected representative for certain purposes for a limited time period, he should have to show that he *had* selected that representative to perform those functions during that time period. In any event, counsel's theory would make a mockery of *Florida Power & Light*. For, while it does not appear from that opinion whether the supervisors performed any non-rank-and-file work, there is absolutely no indication that they did, or

could have done, *no* bargaining or grievance adjustment when they crossed the picket line. Under counsel's theory, there would be a violation as long as the supervisor could perform *some* § 8(b)(1)(B) function if he crossed the picket line. Thus, a violation of § 8(b)(1)(B) could be found in *any* future case concerning discipline of any supervisor who ever performs any § 8(b)(1)(B) functions for crossing a picket line—even a case precisely the same as *FP&L* on its facts.

Moreover, the notion that the discipline of supervisor-members who cross picket lines "restrained or coerced" employers in the selection of their § 8(b)(1)(B) representatives during that strike entirely fails to come to grips with the fact that the same effect on the employer may result without discipline. It has not been contended by anyone that it is unlawful for a union to erect a picket line which supervisor-members may, of their own volition, refuse to cross to perform even § 8(b)(1)(B) duties, or that the union may not request them to honor the picket line in recognition of their union obligations.[14] When this happens, the employers

[14] Indeed, *Florida Power & Light* noted:

> "In light of the fact that 'Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions,' *NLRB* v. *Drivers Local No. 639*, 362 U.S. 274, 282-283 (1960), the admonition against regulation of the choice of economic weapons that may be used as part of collective bargaining absent a particularized statutory mandate is particularly apt in this context. *NLRB* v. *Insurance Agents*, 361 U.S. 477, 490 (1960)." (*Id.*, at 804, n. 16.)

To suggest that unions may not request, and receive, the support (at their peril) of supervisor-members in an economic strike, whether that support entails refusing to perform rank-and-file work or refusing to work at all, would certainly be to suggest the regulation of an economic weapon Congress has not seen fit particularly to interdict.



may be deprived of their services for the duration of the strike. If the employer is being "coerced" or "restrained" at all with regard to his selection of § 8(b)(1)(B) representatives for the duration of the strike, this "coercion" comes about simply because of the picket line and the strike, and not because of the discipline. § 8(b)(1)(B) addresses restraint and coercion of *employers*, not *supervisors*. Yet the only difference between the voluntary and involuntary refusals to cross a picket line is its impact on the supervisor.[15] *They* may be said to be "restrained or coerced," but the effect on the employer is the same whether the respect for the picket line is voluntary or not.

The Board argues further that even if the attempt to enforce withdrawal of services by fines with regard to *this* strike is not independently a § 8(b)(1)(B) violation, the fact that supervisors thus disciplined may decline to work and perform § 8(b)(1)(B) functions during the next strike, if there is one, would make it so. Much of what has already been said disposes of this contention, by demonstrating that enforcing withdrawal of supervisors' services during a strike does not constitute an § 8(b)(1)(B) violation at all. But in addition, it must be recognized, first, that the employer has the option of requiring supervisor-members to withdraw from the union after the strike is over and thereby to prevent this possibility.[16] Further, if the asser-

[15] If supervisors honor the picket line they may be discharged by the employer with impunity; if they do not do so, they may be discipined by the union. This may well place the *supervisors* in an unfortunate situation, but it is one with which the Act is entirely unconcerned, because Congress chose to leave them unprotected. See *FP&L*, 417 U.S. at 812, n. 22, and *Beasley* v. *Food Fair of North Carolina, Inc.*, 416 U.S. 653.

[16] Indeed the existence of this option would appear to be sufficient to dispose of the *Hammond Triangle* theory as well.

tion is that the union will use the discipline in this strike, not directed at performance of § 8(b)(1)(B) functions to coerce supervisor-members in the future with regard to crossing picket lines only to bargain or adjust grievances, then the answer is that if such future action would be illegal, it may not be presumed that the union will engage in it. (See pp. 22-24, 27, *supra*). Finally to the extent that this amounts to a prediction that disciplining persons who perform only supervisory duties may lead that person, regardless of any union attempt, to withhold §8(b)(1)(B) services in the future, we are back yet again to the confusion between general supervisory duties and the particular § 8 (b)(1)(B) functions which pervades the Board's whole approach. That is, the only reason why this "carry-over" is more likely than a "carry-over" where the discipline relates only to performance of rank-and-file work is that the *Board* believes that the performance of § 8(b)(1)(B) duties in the future is inextricably intermeshed with maintaining complete employer control over all supervisory functions, not because Congress so legislated or because the supervisors themselves will see this special connection. For the supervisor, and for the employer, the problem will remain the same in a present strike as in a future strike and will remain the same whether some supervisors are fined during this strike or not. That problem is that conflicting loyalties are inherent in the situation, and that supervisors in a strike situation are forced to choose. The choice they make, and the fact that they must choose, is no part of the problem addressed by § 8(b)(1)(B), as *Florida Power & Light* so clearly states. The Board has erred in attempting to ease the dilemma by reading into this part of the statute purposes and concerns which it was never intended to address.



It is worth remembering, in conclusion, that § 8(b)(1)(B) was represented by its Congressional supporters to be "not * * * of tremendous importance." (93 Cong. Rec. 3837, quoted in *FP&L*, 417 U.S., at 804), and that

> "[w]hile * * * the legislative accommodation adopted in 1947 [with regard to supervisors as members of unions] is fraught with difficulties of its own, "[i]t is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute." *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363, 94 L Ed 161, 70 S Ct. 166 (1949)." (*Florida Power & Light*, 417 U.S., at 811.)

If § 8(b)(1)(B) had the effect of prohibiting unions, for whatever reason from enforcing with regard to any of its members prohibitions upon working during a strike, it *would* be "of tremendous importance." For, it would amount to the declaration that the national labor policy provides that even though supervisors may be members of unions and obtain all the benefits thereof, they cannot be required to support the union in seeking, through the use of economic weapons central to its power, the terms and conditions of employment it seeks. If this one-sided resolution of the conflict-of-loyalties problem inherent when supervisors are permitted to be union members were intended, one would certainly expect some glimmer of a suggestion in that regard in the language, legislative history, or first twenty years of interpretation of § 8(b)(1)(B). There is none. The Board may be troubled by the difficulties created when a supervisor is placed in such a situation, but it is not, as this Court has already stated, permitted to convert a minor and limited provision into a major limitation on union economic weapons. *FP&L*, 417 U.S. at 805, n. 16.

## CONCLUSION

For the foregoing reasons, and in order to assure that in the future the NLRB exercises conceptual faithfulness to this Court's opinion, the judgment of the Court of Appeals should be affirmed.

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